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91-20

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

STATE TAX COMMISSION OF THE STATE OF MISSOURI and
DIRECTOR OF DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,
*Petitioners,*

VS.

TRAILER TRAIN COMPANY, RAILBOX COMPANY and RAILGON COMPANY,
*Respondents.*

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does Section 306(1)(d) of the 4-R Act[1], prohibiting "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . .," require a finding of actual discrimination for a state tax to be "an unreasonable and unjust discrimination against, and undue burden on, interstate commerce"?

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[1] The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (Feb. 5, 1976), codified at 49 U.S.C. § 11503 (1988). The Court of Appeals based its decision on the language of the Public Law, rather than that of the United States Code, which is different. See footnote 3 on page A-2 herein. The Public Law will be referred to herein as "the 4-R Act."

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Petition for Writ of Certiorari to the
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## PETITION FOR WRIT OF CERTIORARI

The petitioners State Tax Commission of the State of Missouri and Director of the Department of Revenue of the State of Missouri respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 9, 1991.

### OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not yet reported, and is reprinted in the appendix hereto at page A-1.

The Order of the District Court for the Western District of Missouri (Wright, D. J.) has not been reported, and is reprinted in the appendix hereto at page A-11.

## JURISDICTION

Invoking federal jurisdiction under Section 306(2) of the 4-R Act, the respondents brought this suit in the District Court for the Western District of Missouri. The District Court granted respondents' motion for summary judgment. See page A-11 herein.

On petitioners' appeal, the Court of Appeals for the Eighth Circuit on April 9, 1991, entered a judgment and an opinion affirming the District Court's order. See page A-1 herein. A timely petition for rehearing or rehearing en banc was filed on April 16, 1991, and was denied on May 30, 1991. See page A-15 herein.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1) (1988).

## STATUTES INVOLVED

Because of their length, Section 306(1) of the 4-R Act and the challenged Missouri private car tax statutes are set forth in the appendix hereto at pages A-16 and A-18, respectively.

## STATEMENT OF THE CASE

Three railroad carline companies, the respondents herein, Delaware corporations doing an interstate business of furnishing railroad cars for use in interstate commerce, filed this suit challenging the state of Missouri's private car tax, Mo. Rev. Stat. § 152.010 *et seq.* (1986), which is imposed exclusively against carline companies. The carlines alleged that because the private car tax was imposed exclusively against them, the tax was discriminatory and violative of Section 306(1)(d) of the 4-R Act,

prohibiting "the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . . ."

The carline companies moved for summary judgment. The state officials opposed the motion for summary judgment upon the basis that there was a genuine issue of material fact whether discriminatory treatment actually resulted to the carlines. The state officials produced affidavits showing that the carlines did not collect from their customers and pay to the state of Missouri a use tax on the lease of their rail cars which are used in the state, and that the use tax if it were to be imposed on them, may be more than the private car tax. The private car tax is 3% of the total amount received for railroad car rentals by the carline companies. Mo. Rev. Stat. § 152.030 (1986). The use tax is 4.225% of the amount paid or charged for rental or lease of tangible personal property. Mo. Rev. Stat. §§ 144.020.1(8) and 144.610.1 (1986); Mo. Const., Art. IV, §§ 43(a) and 47(a).[2]

The District Court for the Western District of Missouri granted the carline companies' motion for summary judgment, declared the private car tax to be in violation of Section 306(1)(d) of the 4-R Act, and permanently enjoined the state officials from assessing, levying and collecting the tax. The basis for the District Court's order was that the private car tax "on its face discriminates by imposing a tax on a 4-R Act protected entity and not on all other commercial and industrial taxpayers in the state . . . ." See page A-13 herein. The District Court declined to consider the private car tax to be a substitute for any other tax. See page A-12 herein.

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[2] The carlines had alleged in their complaint, in the alternative, that the private car tax was a substitute for the property tax, and that the full market value of their personal property was taxed under the private car tax, but only 25% of the market value of locally-assessed commercial and industrial personal property (exclusive of motor vehicles) was taxed under the property tax.

The Court of Appeals for the Eighth Circuit affirmed the District Court's order. The Court of Appeals reasoned:

> Although Section 306 prohibits only taxes that "result" in discriminatory treatment, a tax that applies only to one class of businesses necessarily discriminates against that class; under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of Missouri's overall tax structure.

See pages A-5-6 herein.

## REASONS FOR GRANTING THE WRIT

### A. In concluding that a violation of Section 306(1)(d) of the 4-R Act occurs when there exists apparent discrimination unrebutted by the taxing authority, the Court of Appeals ignored basic rules of statutory construction established by this Court to determine Congressional intent.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The Court of Appeals has decided that for there to be a violation of Section 306(1)(d) of the 4-R Act, there need be only apparent discrimination unrebutted by the taxing authority, rather than actual discrimination proven by the taxpayer. The determination of which of these polar opposites, apparent or actual discrimination, Congress intended is surely an important question of federal law which should be settled by this Court.

In deciding this important question of federal law, the Court of Appeals ignored basic rules of statutory construction established by this Court to determine Congressional intent. The Court of Appeals did not even consider the rule that in all cases involving statutory construction, the starting point must be the language employed by Congress; or the rule that it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used; or the rule that absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Had the Court of Appeals not ignored these rules, it would have concluded that "an unreasonable and unjust discrimination against, and undue burden on, interstate commerce" is defined as resulting discriminatory treatment, and that the words "results" and "treatment" indicate that actual discrimination is the concern of the statute. The Court of Appeals, however, relied upon *Arizona Pub. Ser. Co. v. Snead,*

441 U.S. 141 (1979), which interpreted a federal statute whose language prohibits only "a greater tax burden."

### B. The conclusion that apparent discrimination unrebutted by the taxing authority violates Section 306(1)(d) of the 4-R Act is illogical and leads to absurd results, including prohibiting virtually any personal property taxation of railroads and carlines and non-railroad public utilities.

The conclusion that there need be only apparent discrimination unrebutted by the taxing authority for a violation of Section 306(1)(d) of the 4-R Act to occur has the practical effect of prohibiting virtually any personal property taxation of railroads and carlines and, ultimately, any such taxation of non-railroad public utilities. Non-railroad public utilities, not specifically protected by Section 306(1)(d) of the 4-R Act, have achieved tax avoidance because of the Act. The application of the 4-R Act to the Nebraska statutory exemptions from personal property taxation that were not available to the carlines resulted in the complete absence of personal property taxation of the carlines. *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Because of federal constitutional equal protection and state constitutional uniformity violations that resulted from the application of the 4-R Act to the carlines, other non-railroad public utilities have completely avoided personal property taxation. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1130, 107 L.Ed.2d 1036 (1990).

It is illogical to conclude that a tax which applies only to one class of businesses must necessarily discriminate against that class. Merely because the private car tax is imposed only on the carline companies and not other taxpayers does not necessarily mean that the carlines are subject to discriminatory treatment.

As pointed out by the dissent in the Court of Appeals:

> Discrimination can neither exist or be discovered without a comparison between two allegedly different treatments. Looking only to the treatment of the railroads reveals discrimination by virtue of having singled them out in the first instance as much as by the actual presence of a discriminatory tax.

See page A-7 herein.

If a tax is discriminatory merely because it applies to railroads and carlines and not others, then virtually no tax scheme can be non-discriminatory. The dissent in the Court of Appeals pointed out two of the absurd results that lie waiting in the future. Is a railroad which owns land and pays real estate and sales tax discriminated against because non-landowners pay only the sales tax? Does the exemption for churches from real property taxation result in discriminatory treatment of railroads who do not have the exemption? See pages A-8-9 herein. After all, there is nothing in Section 306(1)(d) prohibiting railroads and carlines from being compared to non-public utility entities, or even non-commercial and industrial entities, such as churches.

The conclusion that there need be only apparent discrimination has the further practical effect of disregarding the fact that fifty per cent of the tax monies collected under the private car tax are required to be used for the construction of safety improvements at railroad grade crossings. Mo. Rev. Stat. § 152.032.1 (1986).

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

United States Court of Appeals
For The Eighth Circuit

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No. 89-2943

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Trailer Train Co., Railgon Co., Railbox Co.,
Appellees,

v.

State Tax Commission, Director of Department of Revenue,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

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Submitted: January 9, 1991
Filed: April 9, 1991

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Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

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BOWMAN, Circuit Judge.

This case requires us to decide whether a special tax imposed by the state of Missouri on rentals derived from the leasing of railroad cars violates federal law prohibiting state taxes that discriminate against railroads. The plaintiff freight-line companies filed their complaint in the District Court[1] against the State

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

Tax Commission of Missouri and the Director of the Department of Revenue of the State of Missouri,[2] alleging that Missouri's Private Car Tax, Mo. Rev. Stat. Ch. 152 (1986), violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, codified at 49 U.S.C . 11503 (1988) ("the 4-R Act"). The District Court granted the plaintiffs' motion for summary judgment and permanently enjoined the state from assessing, levying, or collecting any taxes pursuant to the Private Car Tax. The state appeals. We affirm.

Section 306 of the 4-R Act states in relevant part that "[i]t is unlawful for a State... to commit any of the following prohibited acts . . . (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."[3] 90 Stat. at 54. Section 306 thus forbids all taxes that discriminate against railroads (not just discriminatory property taxes) and covers the plaintiffs in this case, who are engaged in the business of leasing railroad cars to railroads that use the leased cars in their interstate operations. *See Trailer Train v. Bair*, 765 F.2d 744, 745 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985).[4] The issue before us whether the Private Car Tax, which applies only to freight line companies such as the plaintiffs, Mo.

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[2] In this opinion we refer to the defendants collectively as "the state."

[3] We use the language of Section 306, even though its codified version at 49 U.S.C. § 11503 is different. *See Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416 n.2 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 206 n.1 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). For a more complete discussion of Section 306 and its legislative history, see *Ogilvie*, 657 F.2d at 206-08.

[4] The state does not contest the proposition that the plaintiffs, as lessors of railroad cars, are protected by the 4-R Act.

Rev. Stat. §§ 152.010-152.030, violates the 4-R Act's prohibition against "any other tax which results in discriminatory treatment."[5]

The state argues that Section 306 requires a finding of actual discriminatory effect, because only those taxes that "result" in discriminatory treatment are prohibited. To determine whether the Private Car Tax brings about such a result, the state contends, the District Court should have conducted an in-depth examination of Missouri's complete tax structure as it applies to the plaintiffs and to other businesses; if the Private Car Tax is in essence an equivalent (or, as detailed analysis might reveal, an even less burdensome) substitute for another tax of general applicability, then it does not violate Section 306.

This argument, however, runs contrary to both Supreme Court and Eighth Circuit precedent. In *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), the Supreme Court dealt with the issue of whether a New Mexico state tax on electricity, which in effect applied only to electricity generated in New Mexico and sold out of state, violated a federal statute prohibiting taxes on electricity that were discriminatory against out-of-state consumers. *Snead*, 441 U.S. at 143-47. The federal statute defined a discriminatory tax as one that "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." *Id.* at 146 (citation omitted). The state argued that an examination of New Mexico's entire tax structure was required to determine whether or not the electricity tax violated the federal statute. *Id.* at 149. The Supreme Court rejected this argument, saying

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[5] The Private Car Tax requires freight line companies to pay a tax "equal to three percent of the total amount received for [railroad] car rentals by the freight line companies." Mo. Rev. Stat. § 152.030.

> The federal statutory provision is directed specifically at a state tax "on or with respect to the generation or transmission of electricity," not to the entire tax structure of the State. The tax imposed by New Mexico[ ] . . . is concedely a tax on the generation of electricity . . . . To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the . . . tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates that federal statute.

*Id.* at 149-50 (emphasis in original).

In *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), the state of North Dakota argued that its tax system was equitable and not violative of Section 306 because the higher property tax imposed upon railroads was offset by a business privilege tax that other businesses were required to pay and railroads were not. *Ogilvie*, 657 F.2d 207-10. We first quoted with approval the conclusion of the district court that " '[t]he most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class.' " *Id.* at 210. The Court then went on to state that "North Dakota's rationalization that they have an equitable tax system because of a business privilege tax is nothing more than an attempt to resurrect . . . an exemption from § 306 for states with a 'reasonable classification of property.' Congress did not accept the proposal and this court will not accept it." *Id.*

We are bound by the reasoning of *Snead* and *Ogilvie*. The Private Car Tax is imposed solely on freight line companies, who are among the intended beneficiaries of the protection granted by the 4-R Act. Although Section 306 prohibits only taxes that

"result" in discriminatory treatment, a tax that applies only to one class of businesses necessarily discriminates against that class; under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of Missouri's overall tax structure. *Snead*, 441 U.S. at 150; *Ogilvie*, 657 F.2d at 210. "The 4-R Act . . . is a prophylactic rule to prevent tax discrimination. It forbids some fair arrangements because the actual fairness of those arrangements is too difficult and expensive to evaluate." *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). "[T]he categorical language of the 4-R Act demands brightline rules for simple judicial administration." *Id.* at 378.[6]

The state challenges the holding of the District Court on two additional grounds. First, it argues that because some of the proceeds of the Private Car Tax are used to benefit railroads, the tax is not violative of the 4-R Act. This argument is without merit, as the use of the proceeds of a tax has no bearing on the question of whether the tax is discriminatory. Second, the state challenges the holding of the District Court on the grounds of comity. This issue is raised for the first time on appeal. We therefore decline to consider it. *See Kelley v. Crunck*, 713 F.2d 426, 427 (8th Cir. 1983).[7]

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[6] "It may be that in an appropriate case we would allow the state to save a facially discriminatory tax showing that it is *necessary* to 'compensate' for some state or local tax . . . that for some reason *cannot* be levied against the railroads." *Kansas City Southern*, 817 F.2d at 376 (emphasis in original). The state does not allege, however, that the Private Car Tax is a substitute for a generally applicable tax that is impossible to levy against lessors of railroad cars.

[7] In any event, this argument is foreclosed by our holding in *Burlington Northern R.R. v. James*, 911 F.2d 1297, 1300 (8th Cir. 1990) ("The common law principle of federal deference to state tax schemes . . . has no place in a § 306 analysis.").

We conclude that the District Court correctly held that Missouri's Private Car Tax violates Section 306 of the 4-R Act and we affirm its order permanently enjoining the state from assessing, levying, or collecting any taxes pursuant to the Private Car Tax.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting.

Because I do not believe that Missouri's Private Car Tax has been shown to result in discriminatory treatment in violation of Section 306(1)(d), I respectfully dissent.

I do not fault the majority for following the precedents of this and other courts of appeal, but I simply cannot in good conscience participate in the juridical extension of legislation to an absurd end. Congress' effort to save the railroads by enactment of the 4-R Act prohibits discriminatory taxation on railroads. The law was originally focused at unfair taxation of railroad property.[3] The concluding catchall provision invoked in this case — 306(1)(d) — has been extended to have the practical effect of prohibiting virtually any taxation of railroads. Perhaps this was the result Congress hoped to achieve, but the language of subsection (d) does not go that far. I do not deny Congress' authority to fully prohibit taxation of the railroads, but I am unwilling to believe that it exercised that authority with this less-than absolute statute. As I read the law, it only prohibits a tax which results in discriminatory treatment.

Of course, "[t]he meaning of 'discrimination' presents a somewhat stickier problem," *McNamara*, 817 F.2d at 374, but I

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[3] On this point, I recommend the entire opinion of Judge Gee in *McNamara* be read, beyond the scant bit quoted by the majority at its footnote six and accompanying text. Particularly, I point out that *McNamara* confesses the truth of what this curt does here and in earlier opinions by taking the catchall provision to its (il)logical end. *See McNamara*, 817 F.2d at 372-73 and n. 8.

think we should meet the challenge head on. Simply saying that "because a tax applies to railroads and no other taxpayer, then the tax is discriminatory" is insufficient analysis. Subsection (d) prohibits taxes that result in discriminatory treatment. We cannot gauge that result by only looking at how the railroad is treated. Examination of other taxpayers and other tax schemes will be necessary to make a comparison. Discrimination can neither exist nor be discovered without a comparison between two allegedly different treatments; looking only to the treatment of the railroads reveals discrimination by virtue of having singled them out in the first instance as much as by the actual presence of a discriminatory tax.

Thus, I disagree with the majority on the proper method for determining when a tax "results in discriminatory treatment." Relying on *Snead*, the majority denies that we may look beyond the state tax in question to gauge its resultant treatment of railroads. I believe we must look beyond the single tax statute, and I do not find the majority's citation to *Snead* for the contrary proposition to be authoritative or persuasive.[9]

The federal statutory scheme in *Snead* was designed to prevent a " 'tax on or with respect to the generation of transmission of electricity' which 'results, either directly or indirectly, in a *greater tax burden* on electricity' consumed outside of New Mexico than that consumed in the State." *Snead*, 441 U.S. at 149 (emphasis added). The federal prohibition here is designed to prevent a tax that "results in discriminatory treatment" of railroads. While violations of the former prohibition may be found

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[9] I also find the majority's citation to *Ogilvie* unhelpful. Though we there declined to look at the overall tax schemes of North Dakota, we were examining a specific violation of 306(1)(a), dealing with property taxes in particular. In this case we are dealing with the broader language of subsection (d). *Ogilvie* does not prevent a likewise broader examination of Missouri's tax laws to discern a discriminatory result against railroads.

by the examination of the isolated tax statute, violations of the latter prohibition cannot be so readily established.

In *Snead*, the Court said that looking only to the type of tax involved without comparison to other New Mexico taxes was sufficient. "Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." *Id.* at 150 (footnote omitted) (emphasis in original). The violation, of course, was that a greater tax burden resulted. Gauging that burden on electricity could be done by looking to the statute alone because the prohibition dealt with the taxation of electricity alone. The determination was only whether the out-of-state taxation was unequal to the in-state burden — either the tax law made the burdens equal or it did not. The resulting unequal burdens on the taxed electricity violated the federal law.

Would that our inquiry was so easily made. I believe that subsection (d) of the 4-R Act as written requires a qualitatively different judgment by the courts to determine whether a tax results in discriminatory treatment which cannot be made by looking at the subject tax singularly. The law and analysis in *Snead* looked to *what* was taxed, while our analysis under 4-R's subsection (d) is more properly focused on *who* is taxed. In the statute considered in *Snead*, Congress was concerned with what was taxed by requiring that the burden on the taxed commodity be equal in and out of New Mexico. With the 4-R Act, Congress is worried not about what is taxed, but that the tax (whatever its burdens) not result in discriminatory treatment of who is taxed, *viz.*, a railroad taxpayer subject to the tax.

Admittedly, a tax on only railroad cars such as Missouri's Private Car Tax is immediately suspect, but not necessarily discriminatory. A myopic review of any tax law will reveal that one party is treated differently from another. Does a sales tax result in discriminatory treatment of landowners who must also

pay real estate taxes while non-landowners pay only the sales tax? Does the exemption for churches from real property taxation result in discriminatory treatment of railroads who cannot get an exemption? I can think of almost no viable tax scheme which would not leave the railroads treated differently from some other taxpayer when the tax is examined in isolation. Perhaps there are no longer any taxes that can survive 4-R, and perhaps states will have to restructure their entire tax laws should they endeavor to successfully tax railroads. I do not believe that Congress by the 4-R Act has yet demanded such results.

I cannot join the court's opinion because I do not believe Congress has broadly eliminated taxation of the railroads without a demonstration of a discriminatory result by comparison to other taxes and taxpayers under subsection (d). I believe such a demonstration is still necessary lest Congress be openly called a fool.[10] I would remand to the trial court to consider whether the tax in question is actually discriminatory considered in conjunction with other state tax provisions. I would employ an analysis like that set forth in *McNamara*, 817 F.2d at 376, despite the absence of the Commerce Clause issue:

> Any state tax scheme is prima facie valid, and the Commerce Clause will "of its own force" invalidate state laws only when the taxpayer can show that the laws will actually operate in a discriminatory fashion. *See Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) ("A state tax must be

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[10] *See McNamara*, 817 F.2d at n. 8 (quoting Judge Warriner in *Richmond, Fredericksburg & Potomac Railroad v. Dept. of Taxation*, 591 F. Supp. 209, 221 (E.D. Va. 1984), *rev'd*, 762 F.2d 375 (4th Cir. 1985).

assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme.").

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX B

In the United States District Court for the
Western District of Missouri
Central Division

No. 88-4571-CV-9-5

Trailer Train Company, et al.,
Plaintiffs,

vs.

State Tax Commission, et al.,
Defendants.

## ORDER

Before this Court is plaintiff's motion for summary judgment seeking a determination that the State of Missouri's Private Car Tax, Mo. Rev. Stat. Chapter 152 (1986), violates section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. § 11503 (4-R Act). Plaintiffs further seek a permanent injunction prohibiting defendants from assessing, levying and collecting taxes under Mo. Rev. Stat. Chapter 152 (Chapter 152). Defendants oppose plaintiffs' motion alleging that genuine issues of material fact are in disguise. Finding, for the following reasons, that there are no genuine issues of material fact and that, as a matter of law, plaintiffs are entitled to prevail, plaintiffs' motion for summary judgment will be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552-3 (1986); Fed. R. Civ. P. 56(c).

Section 306 makes it unlawful for a state to impose any tax "which results in discriminatory treatment of a common carrier by railroad subject to this party." 4-R Act; *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985). Chapter 152 imposes a gross receipts tax on private car line companies such as plaintiffs and, with one minor exception, on no other taxpayers.

Plaintiffs are concedely protected by the 4-R Act. *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468 (8th Cir. 1983). (Defendants request that this Court ignore this clear and clearly applicable opinion and hold that plaintiffs are not protected by the 4-R Act. This Court rejects without discussion defendants' request.) The only issue to be decided, then, is whether the tax imposed by Chapter 152 is discriminatory within the meaning of the 4-R Act.

Defendants contend that there remains a genuine issue of fact as to whether the Chapter 152 tax imposed on plaintiffs is actually discriminatory. In support of this contention, defendants suggest that the Chapter 152 tax should be compared to Missouri's corporate franchise tax, Mo. Rev. Stat. Chapter 147 (1986), which plaintiffs currently do not pay, or to Missouri's use tax, Mo. Rev. Stat. Chapter 144 (1986). If, defendants argue, such a comparison shows that plaintiffs pay taxes less than, equal to, or not unreasonably higher under Chapter 152 than they would under the corporate franchise or use tax, then the Chapter 152 tax imposed on plaintiffs is not discriminatory within the meaning of the 4-R Act. This Court shall not adopt such a comparative method of determining discriminatory taxation within the meaning of the 4-R Act.

Defendants' proposed method is rife with factual and procedural difficulties. While suggesting that the Chapter 152 tax scheme could be considered a substitute for the corporate franchise tax, defendant points to the fact that express and insurance companies and banking institutions are exempt from the franchise tax and taxed under separate taxing schemes. Defendants then suggest that the Chapter 152 tax under which plaintiffs are taxed is similar to the financial institutions tax, Mo. Rev. Stat. Chapter 148. Defendants further suggest that the Chapter 152 tax could be considered a substitute for the use tax of Mo. Rev. Stat. Chapter 144.

This Court, not unlike defendants, believes a determination of which Missouri tax scheme should be used as a comparison to the Chapter 152 tax in determining whether plaintiffs are discriminatorily taxed would amount to little more than a random meander through the various Missouri taxation statutes in an attempt to fall across an acceptably close fit. Additionally, this Court would be forced to compile and evaluate the numerous bases used for taxation — property value, income, sales, use, etc. — to come to a reasonably accurate figure from which to make a determination as to the discriminatory effect of the Chapter 152 tax. Such a method would strain the limited resources of this Court, plaintiffs and defendants.

This Court agrees with the Fifth Circuit's recent conclusion: "[T]he categorical language of the 4-R Act demands bright-line rules for simple judicial administration." *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 378 (5th Cir. 1987). Where, as here, a state statute on its face discriminates by imposing a tax on a 4-R Act protected entity and not on all other commercial and industrial taxpayers in the state, such statute violates § 306 of the 4-R Act.

Defendants also argue that because 50% of the money collected under Chapter 152 is earmarked for protection of the public at railroad crossings, Chapter 152 may not be discriminatory under the 4-R Act. Section 306 of the 4-R Act, however, does not provide for an exception based on the use to which the collected money is put to its prohibition of discriminatory state taxation.

This Court is not unmindful of difficulties state legislators may face in meeting the requires of the 4-R Act. It is also confident that Missouri's legislators will be able, if they see fit, to formulate a fair tax within the requirements of the 4-R Act.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted. it is further

ORDERED that the private car tax imposed on plaintiffs by Chapter 152 of the Revised Statutes of Missouri is in violation of § 305(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503. It is further

ORDERED that each and every one of the above-named defendants, their agents and those acting with or for them are permanently enjoined from the assessment, levy and collection of any taxes against plaintiffs under or pursuant to Chapter 152 of the Revised Statutes of Missouri.

/s/ SCOTT O. WRIGHT
United States District Judge

October 27, 1989

## APPENDIX C

United States Court of Appeals
For The Eighth Circuit

No. 89-2943WM

Trailer Train Co., Railgon co., Railbox Co.,
Appellees,

v.

State Tax Commission, Director of Department of Revenue,
Appellants.

Order Denying Petition for Rehearing with
Suggestion for Rehearing En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay and Judge McMillian voted to grant the petition for rehearing with suggestion for rehearing en banc.

Petition for rehearing by the panel is also denied.

May 30, 1991

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

## APPENDIX D

Section 306(1) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (Feb. 5, 1976):

### PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate

higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

## APPENDIX E

Mo. Rev. Stat. § 152.010 (1986):

**152.010. Definitions.**—1. The term **"car rental"** as used in this chapter shall mean and include the amount received by freight line companies from railroads or street railway companies for the use of cars furnished or leased by said freight line companies in this state.

2. The term **"commission"** as used herein shall mean the state tax commission.

3. Any person, association, company or corporation, not being the owner or lessee of a railroad or street railway company, engaged in the business of furnishing or leasing any railroad cars except dining, buffet, chair, parlor, palace or sleeping cars, which are used in the operation of any railroad or street railway company wholly or partly within this state, or when owning and operating, or operating, any railroad freight, refrigerator or tank car on railway lines in this state for the transportation of his or its goods, wares, merchandise or products, shall be deemed a **"freight line company"**.

Mo. Rev. Stat. § 152.030 (1986):

**152.030. Commission to inspect reports—tax in lieu of ad valorem tax.**—1. It shall be the duty of the commission to inspect and verify the reports specified in section 152.020.

2. A copy of such reports shall be furnished to the director of revenue not later than September first of each year, together with a statement of taxes against such freight line companies as represented by said reports in an amount equal to three percent of the total amount received for car rentals by the freight line companies.

3. Such tax shall be in lieu of any ad valorem tax by the state or any subdivision thereof on the rental cars of freight line companies.

Mo. Rev. Stat. § 152.032 (1986):

**152.032. Grade crossing fund established, how funded, how spent—**1. Fifty percent of all taxes collected by the director of revenue under the provisions of this chapter shall be deposited in the state treasury to the credit of a fund to be known as the "Grade Crossing Fund", which is hereby created and established for the purpose of providing revenues to protect the public against hazards existing at the crossings of public roads, streets, and highways with railroad tracks. Whenever the transportation division of the department of economic development, pursuant to section 389.640, RSMo, orders the installation, construction or reconstruction of automatic signals or other safety devices or other safety improvements at crossings at grade of railroads and public roads, highways or streets, the cost thereof, which the division apportions against the state, county, municipality or other public authority in interest, shall be paid out of the grade crossing fund, provided, however, that when any part of such cost can be paid from funds available under any federal or federal aid highway act such part shall not be paid from the grade crossing fund; and provided, further, that no more than ninety percent of the cost of protecting any grade crossing shall be paid out of the grade crossing fund. The transportation division of the department of economic development shall, in cooperation with other governmental agencies of the state, determine if any such cost can be paid from funds available under any federal or federal aid highway act. An order of the transportation division of the department of economic development for the payment of any such cost from the grade crossing fund shall be authority for the state treasury to pay out of

that fund to the person, firm, or corporation entitled thereto under the division's order the amount so determined to be paid from said fund. However, such payments annually shall not exceed in any one county an amount equal to the distribution as set forth in section 152.050, unless the transportation division of the department of economic development makes a specific finding of facts and conclusions of law that a situation highly dangerous to the public does exist.

2. The unexpended balance in the grade crossing fund at the end of each fiscal year shall not revert to the general revenue fund as provided in section 33.080, RSMo, but shall accumulate from year to year.

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

(2)

No. 91-20

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

STATE TAX COMMISSION OF THE STATE OF MISSOURI, and DIRECTOR OF DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,

*Petitioners,*

v.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, and RAILGON COMPANY,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Does Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503, which prohibits the imposition of any tax which results in the discriminatory treatment of common carriers by railroad, prohibit the imposition of a tax on private railcar companies when that tax is not imposed on any other commercial and industrial taxpayers in the State?

## LIST OF PARTIES TO THIS PROCEEDING

The Petitioners are the State Tax Commission of the State of Missouri and the Director of the Department of Revenue of the State of Missouri (referred to herein collectively as the "State").

Respondents are Trailer Train Company, Railbox Company, and Railgon Company (referred to herein collectively as "Trailer Train"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief. As of July 1, 1991, Trailer Train Company has changed its name to TTX Company.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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**No. 91-20**

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STATE TAX COMMISSION OF THE STATE OF MISSOURI, and DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,

*Petitioners,*

v.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, and RAILGON COMPANY,

*Respondents.*

---

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is reported at 929 F.2d 1300 (8th Cir. 1991), is reprinted in Appendix A to the Petition. The opinion of the United States District Court for the Western District of Missouri, dated October 27, 1989, is unreported, and is reprinted in Appendix B to the Petition.

## JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

## STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978). In the opinions in this case of both courts below, the courts have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. Accordingly, Trailer Train will refer to the language of Section 306 in this response. Section 306 is reprinted, in part, in Appendix D to the Petition.

The Missouri Private Car Tax statutes are reprinted in Appendix E to the Petition.

## STATEMENT OF THE CASE

Trailer Train is satisfied with the Statement of the Case contained in the Petition.

## REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court. Trailer Train respectfully submits that the Petition should be denied.

**1. No Special or Important Reasons Exist for Granting the Writ.**

The State makes two arguments, both of which turn on statutory interpretation of Section 306, as to why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Eighth Circuit. The arguments, however, simply state the State's conviction that the Eighth Circuit's decision was incorrect. The State has been unable to point to any reason that this case presents an issue so special or so important to the public that it should be accepted by this Court, other than that the provisions of Section 306 as interpreted by the Eighth Circuit have "the practical effect of prohibiting virtually any personal property taxation of railroads and carlines and, ultimately, any such taxation of non-railroad public utilities." Petition, page 6.

This complaint is exaggerated and irrelevant.

First, this case involves a gross receipts tax imposed only on railcar companies, and not on any other class of taxpayers. Therefore, it is inexplicable why the State complains that the Eighth Circuit's decision threatens the imposition of personal property taxes by the State.

Second, the State's assertion that under this interpretation of Section 306(1)(d) virtually no tax scheme can be non-discriminatory is simply untrue. Every decision by a United States Court of Appeals interpreting Section 306(1)(d) has made clear that any tax that is imposed generally on other commercial and industrial taxpayers may also be imposed on railroads and railcar companies. *See, e.g., Burlington Northern R.R. Co. v. City of Superior*, 932 F.2d 1185, 1188

(7th Cir. 1991) (state is confined to taxing railroads as members of larger taxpayer groups such as owners of commercial and industrial property or recipients of gross receipts or net income); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987) ("We think the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial taxpayers' ").

Third, the Nebraska case cited by the State, *Northern Natural Gas Co. v. State Bd. of Equalization*, 232 Neb. 806, 443 N.W.2d 249, *cert. denied*, ___ U.S. ___, 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990), turned on an issue of Nebraska constitutional law and is therefore not relevant to this proceeding.[1] There is no record here of any similar state constitutional issues in Missouri. The State's reliance upon hypothetical state constitutional consequences blurs the federal question presented and underscores the lack of a proper basis for certiorari.

The State alleges that the district court's holding means that a state can never rebut the presumption of discrimination that arises from the imposition of a specialized tax on railroads or railcar companies. This is again untrue. In *Kansas City Southern*, the Fifth Circuit stated that:

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[1] *See* Hellerstein, *Equal Protection Run Amok?: An Analysis of the Nebraska Supreme Court's Decision in the Northern Natural Gas Case*, Tax Notes, November 20, 1989. In any event, the continued validity of the *Northern Natural Gas* decision has now been placed in doubt by a new decision of the Nebraska Supreme Court, *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization and Assessment*, Case No. 90-871 (Neb., July 10, 1991).

> It may be that in an appropriate case we would allow the state to save a facially discriminatory tax by showing that it is *necessary* to "compensate" for some state or local tax—a tax applicable to "other commercial and industrial" taxpayers—that for some reason *cannot* be levied against the railroads.

817 F.2d at 376 [emphasis in original]. The Fifth Circuit also stated that once a Section 306 plaintiff has proved a prima facie case of discriminatory taxation, the burden shifts to the state to prove that the facially discriminatory tax is justified. *Id.*

This case was decided on Trailer Train's motion for summary judgment, in which Trailer Train proved that the tax was facially discriminatory. The State then had a full opportunity to make the showing of necessity suggested by the Fifth Circuit, but it failed to do so. Instead of trying to show why it might need to impose a specialized tax only on private railcar companies, the State tried to find some other tax that might be comparable to the gross receipts tax at issue. As did the State of Louisiana in the *Kansas City Southern* case, the State urged that the use tax was comparable to the gross receipts tax at issue. That tax is clearly not comparable to the gross receipts tax because the bases of the two taxes are substantially different. *Cf. Armco, Inc. v. Hardesty*, 467 U.S. 638, 642-43, 104 S.Ct. 2620, 2623, 81 L.Ed. 540 (1984); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

The State was given a full opportunity in briefing the motion for summary judgment to rebut the discriminatory nature of the private car tax, and it failed

to do so. This case therefore presents no special or important reason for the granting of a writ of certiorari.

**2. No Conflict Exists among the Circuit Courts, or between the Decisions Below and Decisions of This Court, on the Issue of Whether the Entire Tax Structure of a State Must be Analyzed in Order to Determine Whether a Specific Tax is Discriminatory.**

The State wisely does not assert conflict as a ground for this Court to grant certiorari, since there has been virtual unanimity among the Circuit Courts that have interpreted Section 306(1)(d). The State does seem to argue, however, that the district court should have examined other taxes paid by other classes of taxpayers in order to determine whether this gross receipts tax is discriminatory, and this argument directly contradicts the holdings of the United States Courts of Appeal and this Court.

The Eighth Circuit held in this case that "under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of Missouri's overall tax structure." 929 F.2d at 1303; Petition, Appendix A, page A-5. This holding was based on the Eighth Circuit's earlier decision in *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), and on the decision of this Court in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), which concerned a federal statute prohibiting taxes on electricity that were discriminatory against out-of-state consumers. In *Snead*, this Court stated:

> To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to

> be faithful not only to the language of that statute but also to the expressed interest of Congress in enacting it. Because the tax . . . *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-50 [emphasis in original].

This holding, that the analysis of a court in determining whether a tax violates Section 306 must be focussed on the tax itself and not on the overall tax structure of the state, has also been upheld by the Fifth Circuit in *Kansas City Southern*, *supra*; and by the Seventh Circuit in *Burlington Northern v. City of Superior*, *supra*. In addition, this ruling has been made by the District Court for the Middle District of Alabama on remand from the Eleventh Circuit. *Alabama Great Southern Ry. Co. v. Eagerton*, 541 F.Supp. 1084 (M.D. Ala. 1982), *on remand from* 663 F.2d 1036 (11th Cir. 1981). There is no authority to the contrary.

## CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## SHAREHOLDERS IN TTX COMPANY

ATCHISON, TOPEKA & SANTA FE RY CO.

BOSTON AND MAINE CORP.

BURLINGTON NORTHERN R.R. CO.

CENTRAL OF GEORGIA R.R. CO.

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.

CONSOLIDATED RAIL CORP.

CSX TRANSPORTATION, INC.

DENVER & RIO GRANDE WESTERN R.R. CO.

FLORIDA EAST COAST RY. CO.

GRAND TRUNK WESTERN R.R. CO.

ILLINOIS CENTRAL R.R. CO.

KANSAS CITY SOUTHERN RY. CO.

MISSOURI PACIFIC R.R. CO.

NORFOLK SOUTHERN RY. CO.

NORFOLK & WESTERN RY. CO.

RICHMOND, FREDERICKSBURG & POTOMAC R.R. CO.

ST. LOUIS SOUTHWESTERN RY. CO.

SOO LINE R.R. CO.

SOUTHERN PACIFIC TRANSPORTATION CO.

STARR HOLDING CORP.

UNION PACIFIC R.R. CO.